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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2026

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of New Jersey entered on March 26, 1980, and submit this statement to show that substantial federal questions are presented and that the Supreme Court has jurisdiction of the appeal.

Opinions Below

The opinion of the New Jersey Supreme Court is printed in Appendix A* hereto, p. 1a. It has not yet been reported. The opinion of the court of first instance (New Jersey Superior Court, Chancery Division) is printed in Appendix B hereto, p. 39a. It has not been reported.

Jurisdiction

Appellants filed this action in June 1977, in the Superior Court of New Jersey, Chancery Division, to declare unconstitutional the New Jersey Emergency Transportation Tax, also known as the Commuter Income Tax, 54 N.J. Stat. Ann. §§ 8A-1—8A-57 (West) (Supp. 1979), on the grounds that the tax is repugnant to the Privileges and Immunities and Equal Protection Clauses of the Constitution of the United States.

The New Jersey tax, appellants argued, is identical in structure, operation, and discriminatory effect with the commuter income tax struck down in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). Nevertheless, on October 24, 1978, the New Jersey Superior Court granted summary judgment to defendant and declared the tax constitutional.

On appeal to the New Jersey Supreme Court, that court, in a judgment entered on March 26, 1980, held that the Commuter Income Tax does not violate the Equal Protection Clause. As to appellants' claim under the Privileges and Immunities Clause, the New Jersey Supreme Court remanded for a further evidentiary hearing. The Notice of Appeal was filed in that court on June 19, 1980. Appendix D, p. 137a.

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* Appendices A, B, C, and D to this jurisdictional statement are separately bound.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Although the New Jersey Supreme Court in part remanded the case, the judgment below is "final" within the meaning of 28 U.S.C. § 1257, under *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), as discussed more fully *infra,* pp. 15-19.

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax (Commuter Income Tax), 54 *N.J. Stat. Ann.* §§8A-1-8A-57 (*West*) (*Supp.* 1979).

Reprinted in Appendix C to this Jurisdictional Statement, p. 62a.

U.S. Const., Art. IV, § 2, cl. 1

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

U.S. Const., Amend. XIV, § 1

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Does a New Jersey statute which taxes income of New York residents earned in New Jersey at a rate of up to 15%, while at the same time imposing either no tax whatsoever, or a tax not exceeding 2½%, on the income of New Jersey residents earned in New Jersey, violate the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution?

2. Does a New Jersey statute which taxes income of New York residents earned in New Jersey at a rate of up to 15%, while at the same time imposing either no tax whatsoever, or a tax not exceeding 2½%, on the income of New Jersey residents earned in New Jersey, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Statement of the Case

Appellants are three citizens and residents of the State of New York who work or who have worked in the State of New Jersey and who therefore have been subject to New Jersey's Commuter Income Tax.

Pursuant to the Commuter Income Tax, first enacted in 1961, New Jersey has taxed New York residents who derive income in or from the State of New Jersey at rates that range from 2% to 15% of taxable income. New Jersey residents, however, paid no income tax whatsoever on their income derived from New Jersey until July 1, 1976, and since that date they have paid income taxes of 2% to 2½%, under a separate tax called the New Jersey Gross Income Tax.*

The New Jersey Commuter Income Tax on New York residents is, and has been since its inception, identical in all significant respects with the New York State income tax. For example, the rate table for the Commuter Income Tax is a carbon copy of the rate table for New York's income tax as set out in the New York statute

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* New Yorkers working in New Jersey, who are subject to the Gross Income Tax as well as the Commuter Income Tax, are required to pay whichever tax results in the higher levy.

books.* Not only are the tax rates and structures of the two taxes identical, but each time New York has amended its income tax statute in any significant respect, New Jersey has shortly thereafter enacted an identical change.

By it terms, the Commuter Income Tax is imposed (a) upon residents of New Jersey on their income earned in another "critical area state" and (b) upon *all* income—including rents, capital gains, and so forth—derived from New Jersey by persons who are not residents of New Jersey but who reside in a "critical area state." 54 N.J. Stat. Ann. § 8A-2 (West) (Supp. 1979). A "critical area state" is one bordering on New Jersey as to which the State Highway Commissioner has certified that there exists a "critical transportation problem" relating to commutation between New Jersey and the bordering state. 54 N.J. Stat. Ann. § 8A-5 (West) (Supp. 1979).

The only "critical area" which has ever been certified is the New York-New Jersey border. Therefore, residents of New York who work in New Jersey and New Jersey residents who work in New York are theoretically subject to the Commuter Income Tax.

In practice, however, only New York residents are subject to the tax. The statute provides to New Jersey residents working in New York a credit against the Commuter Income Tax for income taxes which they pay to New York. 54 N.J. Stat. Ann. § 8A-16 (West) (Supp. 1979). Since New York's income tax is identical in rate with the Commuter Income Tax, New Jersey residents who work in New York pay income taxes to New York which

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* Compare 1978 N.J. Sess. Laws, Ch. 131, with New York Tax Law § 602 (McKinney, 1978) and 1978 N.Y. Sess. Laws, Ch. 70.

necessarily equal in amount the Commuter Income Tax; they therefore receive a full credit and pay no Commuter Income Tax to New Jersey.

No New Jersey resident has ever paid a penny under this tax. Indeed, New Jersey residents have been exempted from filing returns for the Commuter Income Tax. 54 N.J. Stat. Ann. § 8A-19(b) (West) (Supp. 1979); 1 N.J. Tax Reporter (CCH) § 18-301, 305.

Significant to the analysis required by *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), New Jersey does not impose any tax which is payable by New Jersey citizens alone—all of New Jersey's other taxes are imposed upon residents and nonresidents alike.

The purported justification for the Commuter Income Tax is the burden that nonresident commuters allegedly place upon New Jersey's transportation facilities, and the proceeds of the tax assertedly are kept in a special fund for transportation projects. 54 N.J. Stat. Ann. § 8A-20-23 (West) (Supp. 1979). However, transfers from that fund may be and have been made regularly to the State's General Fund and to the Property Tax Relief Fund. *See* 54 N.J. Stat. Ann. § 8A-121 (West) (Supp. 1979).*

Moreover, Governor Meyner, in his original message to the New Jersey legislature, stated that the intent of the statute was to take advantage of tax credits granted by New York State's income tax scheme and divert tax revenues from New York. *See,* Day, *Taxing Interstate Commuters: A New Jersey Experiment Under The United States Constitution,* 18 Rutgers L. Rev. 1, 2 (1963).

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* Annually since 1976, the proceeds of the tax have been kept separate, pending the outcome of this challenge to the tax, and have been disbursed only at the end of each fiscal year.

And finally, imposition of the tax is not limited to New Yorkers who actually commute to New Jersey; rather, the tax is levied on *all* income derived by New Yorkers from New Jersey, including rents and capital gains, whether or not the New York resident ever sets foot in New Jersey.*

Appellants filed this action in June 1977 in the Superior Court of New Jersey, Chancery Division. Appellants moved for summary disposition of the case, arguing that the tax was plainly unconstitutional in light of *Austin*. Appellee submitted voluminous evidence regarding the alleged transportation burden imposed by New York State residents and the alleged benefits they receive from New Jersey, and cross-moved for a declaration that the tax was constitutional. On October 24, 1978, the Superior Court denied appellants' motion and granted appellee's cross-motion for summary judgment. Appendix B, p. 39a.

The Supreme Court of New Jersey thereafter granted appellants' motion to hear a direct appeal from the Superior Court judgment. On March 26, 1980, the New Jersey Supreme Court ruled that the tax was constitutional under the Equal Protection Clause. Appendix A, pp. 31a-35a.

However, with respect to appellants' claims under the Privileges and Immunities Clause, the court remanded for a further hearing, Appendix A, pp. 20a-27a, to determine (1) whether nonresidents constituted the "peculiar source" of the transportation problem advanced by New Jersey as the justification for the tax—even though it is undisputed that many more New Jerseyites than New

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* On the other hand, the tax is not levied on Connecticut residents, many of whom use the very same interstate transportation facilities as New Yorkers to commute to New Jersey.

Yorkers commute across the New York-New Jersey border daily; and (2) whether the discrimination practiced against nonresidents bears a "substantial relationship" to their contribution to that transportation problem—even though appellee himself testified that the rate of tax has never been based on any analysis of transportation problems but was geared *solely* to the New York income tax rates. (Deposition of Sidney Glaser, Jan. 12, 1978 at 59.)

I.

The Federal Questions are Substantial

A. There is an urgent need for the Court promptly to enforce the mandate of *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), and to vindicate appellants' rights under the Privileges and Immunities Clause.

The decision below should be summarily reversed as being directly contrary to this Court's decision in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). If, after this Court has unequivocally decided an issue, a plaintiff must nevertheless spend years in a state-court system re-litigating that very same issue, then, it is fair to say, this Court's very authority is being undermined. Plainly and simply, the State of New Jersey is defying a straightforward decree of this Court.

The New Jersey Commuter Income Tax is indistinguishable from the discriminatory commuter tax which *Austin* held to violate the Privileges and Immunities Clause. Indeed, New Jersey submitted an *amicus* brief to the Court in *Austin* (on behalf of New Hampshire) which conceded that the two states' commuter income tax schemes were "similar." *See* Amicus Curiae Brief of the Attorney General of the State of New Jersey at 3, *Austin* v. *New Hampshire,* 420 U.S. 656 (1975). In fact, the two are identical:

—Each commuter income tax is a duplicate of the income tax imposed by the bordering state;

—Each was designed to, and has the effect of, taking advantage of tax credits granted by the bordering state in order to divert income tax revenues from that bordering state;

—Each is nominally imposed on residents and nonresidents, but, by means of credits or exemptions, in fact is imposed only on nonresidents;

—Each taxing state requires employers to withhold portions of the nonresidents' income for payment of the commuter income tax;

—Each commuter income tax "falls exclusively on the income of nonresidents; and it is not offset, even approximately, by other taxes imposed upon residents alone."* *Austin* v. *New Hampshire,* 420 U.S. at 665.

New Jersey has managed to stave off compliance with *Austin,* first, by engaging in dilatory motion practice in the understandably indulgent New Jersey state courts.**

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* In this and other respects, the New Jersey Commuter Income Tax is worse than the New Hampshire tax invalidated in *Austin.* New Hampshire residents did pay some taxes to which nonresidents were not subjected. *See Austin* v. *New Hampshire,* 420 U.S. at 659 n. 3. Moreover, the maximum rate paid by nonresidents was 4%. New Jersey residents until 1976 paid no taxes to which similarly situated New York residents were not also subjected, and since 1976 have paid a maximum of 2.5% under the New Jersey Gross Income Tax. The Commuter Income Tax imposed on New Yorkers has ranged as high as 15%.

** The tax involves some $40 million annually for New Jersey. The New Jersey trial judge candidly stated on a number of occasions that he was struggling for a way to uphold the tax, despite *Austin.* He said, for example: "[I]f I could find a way to end it or to avoid *Austin,* I surely would sustain this tax." (Transcript of Proceedings, Feb. 23, 1978 at 16.)

Thus, in proceedings to date, the State has 1) moved to transfer the case from the Chancery Division, even though appellants sought primarily declaratory and injunctive relief; 2) moved to dismiss the case for failure to exhaust administrative remedies—in the face of uniform authority holding that no exhaustion is necessary in a constitutional challenge to a statute; 3) moved to dismiss for failure to join New York State as a "real-party-in-interest," even though New Jersey previously had argued—and this Court had held—that New York had no standing;* and 4) moved to dismiss on the ground that plaintiffs lacked standing—on precisely the same argument raised and squarely rejected in *Austin* v. *New Hampshire,* 420 U.S. at 659-60 n. 4.

While the New Jersey courts ultimately dismissed each of these frivolous arguments (some of which were deemed "surprising" by the Superior Court Judge in light of the overwhelming contrary authority), these and other delaying actions by New Jersey have had the effect of dragging out the litigation, now three years old.

The remand ordered by the New Jersey Supreme Court would create much more delay.** But each day that the Commuter Income Tax remains in effect not only repre-

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**New York* v. *New Jersey,* 429 U.S. 810 (1976). New Jersey argued to this Court that "the Privileges and Immunities clause . . . only may be invoked by individual citizens and not by states." Brief of Attorney General of New Jersey in Opposition to Motion for Leave to File Original Action at 7, *Pennsylvania* v. *New Jersey,* 426 U.S. 660 (1976).

** The Attorney General of the State of New Jersey has already informed the lower court that he will move to stay all proceedings on remand pending the resolution of this appeal. He has also stated that if this Court declines to hear the case at this stage, he will seek many months from the date of that decision to prepare for a one or two day trial.

sents a violation of appellants' rights and a victory for New Jersey, but a continuing and conspicuous failure to give effect to an unambiguous decision of this Court. New Jersey continues to collect the unconstitutional tax, amounting to some $40 million annually, hopeful, perhaps, that statutes of limitation, and complex administrative processes, will render the ordering of refunds unlikely.*

The second means by which New Jersey has avoided compliance with *Austin* is by advancing a distinction between this case and *Austin,* and a justification for the tax, which is, with all due respect, a sham. The "transportation" justification alleged to distinguish this case from *Austin* must be meaningless as a matter of law. By definition, a nonresident who works in a neighboring state and thereby earns income can do so only by transporting himself there. This interstate commutation necessarily will impose some cost or "burden" upon the transportation facilities of the taxing state. *Austin* necessarily presented precisely the same problem, and therefore must be read to hold that the "transportation problem" created by the mere movement of residents of one state to work in a neighboring state cannot serve as a legitimate justification for a discriminatory tax. Otherwise, *Austin* would be a nullity.

The asserted "transportation" justification for the tax is also frivolous as a matter of fact. And thus no conceivable fact-finding on remand could justify the tax. It is undisputed that the number of New Jersey residents who commute to New York exceeds the number of New York residents who commute to New Jersey

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* New Jersey undoubtedly draws solace from the fact, of which we are advised, that five years after the *Austin* decision, Maine residents litigating in the New Hampshire courts have not yet succeeded in obtaining refunds.

by a factor of at least two or three to one (Appendix A, p. 22a). Hundreds of thousands of other interstate travelers use the same facilities on a daily basis. Based on these undisputed facts alone, appellee cannot rationally demonstrate that New Yorkers constitute the "peculiar source" of the alleged problem. *See Toomer* v. *Witsell,* 334 U.S. 385, 398 (1948); *Hicklin* v. *Orbeck,* 437 U.S. 518, 526-27. Even if appellee could somehow pass that threshold, the requisite "substantial relationship" between the burdens imposed by nonresidents and the discrimination practiced against them could not possibly be demonstrated. *See Toomer* v. *Witsell,* 334 U.S. at 398-99. Appellee conceded that the tax never even purported to be based on an analysis of any transportation burden created by New Yorkers. It was avowedly designed to be, and is, simply a device to divert New York State income tax revenues to New Jersey. Indeed, as originally enacted in 1961, the tax did not fall on New York residents at all; it was in 1962, when New York changed *its* system of credits, that New Jersey *retroactively* amended the New Jersey Commuter Income Tax to apply only to New Yorkers (Appendix A, pp. 11a, 13a). Further, as noted above, non-commuting New Yorkers, who impose no alleged "transportation burden," are subject to the tax. And, as the New Jersey Supreme Court acknowledged, to the extent the tax proceeds have been used for transportation projects, they have been used to fund intra-state rail and bus facilities utilized almost exclusively by New Jersey residents (Appendix A, p. 23a).

In short, the "transportation" distinction is a makeweight only. It cannot, on the *undisputed* facts, be shown to have any real "relationship" to this tax. More important, it is not a distinction at all, since precisely the same statutory structure, and a completely parallel set of facts (by the very definition of "commutation"), were present in *Austin.*

As was made clear in *Austin,* the interests at stake here are not mere economic interests. The decisions below have had, and will continue to have until overturned, a substantial harmful effect on the right of appellants, and thousands like them, to travel and to pursue their occupations in a neighboring state free from discriminatory treatment and on the structural integrity of the federal system. *See Austin* v. *New Hampshire,* 420 U.S. at 662.

If New Jersey's continued defiance of *Austin* is tolerated, other states will be encouraged to enact discriminatory commuter income taxes of the type struck down in *Austin,* and to seek to insulate those taxes from legal attack merely by dubbing them "transportation taxes." These may be followed by retaliatory taxes, which, as noted in *Austin,* would further disrupt interstate relations.

B. The New Jersey Commuter Income Tax violates appellants' rights under the Equal Protection Clause.

By singling out New York residents who derive income from New Jersey for discriminatory treatment, the New Jersey Commuter Income Tax also violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The tax cannot withstand scrutiny under the lenient standard of review applied by the New Jersey Supreme Court, *i.e.,* the rational basis test. *Austin* holds that the goal of diverting income tax revenues from a sister state is not a legitimate state interest which can justify discrimination. And the hostile and oppressive discrimination against the nonresidents who commute to New Jersey bears no rational relationship to the statute's asserted objective of alleviating interstate transportation burdens.

Surely a "rational basis" test cannot be satisfied by the remote possibility that, by sheerest accident, a statute actually designed to accomplish an impermissible purpose will happen to relate to a legitimate state interest. Surely no "rational basis" test is met when New Jersey imposes a tax not designed to relate to transportation problems, but rather geared only to diverting income tax revenues from New York. Surely the test is not met when the tax rate is based on the New York Income Tax rates and not on any analysis of the alleged transportation problems; when non-commuters who never use the transportation facilities are also subject to the tax; and when Connecticut residents who do use the same facilities are not taxed. *Cf. Califano* v. *Goldfarb,* 430 U.S. 199, 223 (1977) (Stevens, J., concurring) ("[S]omething more than accident is necessary to justify the disparate treatment . . .").

Moreover, the New Jersey Supreme Court erred in holding that the tax could be assessed under the "rational relation" standard, indeed with the additional latitude accorded states in the area of taxation. Appendix A, pp. 33a-34a. That determination sweeps aside the plainly fundamental rights at stake here.

The New Jersey Commuter Income Tax clearly affects, and burdens, specific interests that are undeniably "fundamental" in character. By taxing nonresidents more onerously than it taxes its own residents, New Jersey imposes a burden upon a citizen's right to travel interstate and to establish his abode in the state of his choice. A citizen who works, or wishes to work, in the State of New Jersey, but who desires to reside in the State of New York is simply penalized for his choice of state residence. Thus, not only is the right to travel implicated, but also the right to travel for purposes of employment. *Hicklin* v.

Orbeck, 437 U.S. 518 (1978); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Ward* v. *Maryland,* 79 U.S. (12 Wall.) 418, 430 (1870).

II.

The Judgment Below Is "Final" Under *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975).

This case falls within at least two of the categories of cases in which the Court has found finality even though further state-court proceedings have been ordered. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). *See generally* Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 Harv. L. Rev. 1004 (1978).

First, the case involves important federal rights which require immediate vindication, and a failure immediately to review this case would seriously erode federal policy. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 482-83. The New Jersey Supreme Court denied appellants' Equal Protection claim outright and set forth a standard of review under the Privileges and Immunities Clause to govern the "accounting" of benefits and burdens it ordered on remand—a standard which violates the Court's mandate in *Austin.* Hence the New Jersey Supreme Court has finally determined, albeit erroneously, both of the dispositive federal issues for purposes of subsequent state litigation.

Reversal of the state court on the federal issue would preclude any further litigation of this case, since appellants' position is that the tax is unconstitutional on its face in light of *Austin.* On the other hand, failure immediately to review the state court decision will seriously erode important federal policies by allowing New Jersey to continue to deny residents of New York their rights

under the Privileges and Immunities and Equal Protection Clauses, and to continue to flout the Court's clear mandate in *Austin*. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 482-83.

The very act of remanding the case for further state-court proceedings offends appellants' constitutional rights. Here, as in *Cox Broadcasting*, if the state "court erroneously upheld the statute, there should be no trial at all." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 485. *See also New York* v. *Cathedral Academy*, 434 U.S. 125, at 128 n.4 (1977).

Indeed, the proceedings on remand, like those in *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966), will constitute a patent waste of time and energy. Under *Austin*, the New Jersey statute is unconstitutional on its face. Moreover, as noted above (*supra*, pp. 11-12) no rational fact-finding process could possibly show that New Yorkers are the "peculiar source" of the alleged transportation problem or that there is a "substantial relationship" between the tax and New Yorkers' alleged contribution to that problem.*

The very delay occasioned by the remand violates appellants' rights. The case was instituted three years ago.

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* That the New Jersey Supreme Court chose to remand for further evidence on these issues notwithstanding their apparent simplicity leaves appellants less than assured that they will prevail on remand, particularly since the same issues arose and should have been dispositive in the prior proceedings. Moreover, the New Jersey court apparently has injected an additional factor into the "accounting" to take place below, *i.e.*, the amount of taxes such as the property tax which are paid by residents and nonresidents alike. Appendix A, pp. 24a-25a. In *Austin* v. *New Hampshire*, 420 U.S. at 659 n.3, this Court specifically stated that such taxes are irrelevant to the Privileges and Immunities inquiry.

If the decision below is not immediately reversed, it may well take several additional years to get the dispositive constitutional questions finally determined. *See Mills* v. *Alabama,* 384 U.S. at 218 n.4. Subjecting appellants to lengthy further proceedings in the state courts will result in irreparable injury to fundamental rights.

That the rights here involved are fundamental was established in *Austin* v. *New Hampshire,* 420 U.S. at 662:

> "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism."

Certainly these rights, together with the right to travel —a right partly grounded in the First Amendment— and the right to practice one's occupation in a neighboring state free from discriminatory restrictions, which also are implicated here, are as precious as the rights involved in other cases where the Court has found jurisdiction because delay in vindication of the right is itself intolerable. See *Hicklin* v. *Orbeck,* 437 U.S. at 524-26 (1978). *See also Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 485 n.12; *National Socialist Party of America* v. *Village of Skokie,* 432 U.S. 43, 44 (1977); *Nebraska Press Association* v. *Stuart,* 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers) (". . . [E]ach passing day may constitute a separate and cognizable infringement. . . . In this sense delay itself is a final decision"); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 247 n.6 (1974); *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558 (1963); *Local No. 438 Construction and General Laborers' Union* v. *Curry,* 371 U.S. 542, 548-52 (1963).

Second, and alternatively, the judgment below is "final" because this case may be viewed as one in which the dispositive federal issue will survive and require decision by this Court regardless of the outcome of future state-court proceedings. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 480. That determination may be based on the pragmatic circumstances of the case. *See American Export Lines* v. *Alvez,* 48 U.S.L.W. 4501, 4502-03 (1980). *See also* Note, *The Finality Rule for Supreme Court Review of State Court Orders,* 91 Harv. L. Rev. 1004, 1019-20, n. 89 (1978). *Cf. Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 152-54 (1964); Redish, *The Pragmatic Approach to Appealability in the Federal Courts,* 75 Colum. L. Rev. 89 (1975) (appeals under 28 U.S.C. § 1291).

Appellants' argument that the tax is invalid on its face in light of *Austin* has been finally rejected by the New Jersey Supreme Court, but it will undoubtedly be presented to this Court later if review is not obtained now, no matter what the outcome of the "accounting" ordered by the New Jersey Court. If appellants do not prevail on remand, they will return to this Court on appeal or with a writ of certiorari. On the other hand, if appellants do prevail on remand, they will still raise the issue in response to appellee's inevitable petition for certiorari in this case which involves some $40 million of tax revenues yearly.

Thus, "[n]othing that could happen in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 480. In this sense, the case resembles other cases the Court has reviewed when the proceedings contemplated on remand will not eliminate the federal issue. *See, e.g., American Export Lines* v. *Alvez,* 48 U.S.L.W. 4501 (1980); *New York* v. *Cathedral Academy,* 434 U.S. at 128 n.4

(1977); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945); *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U.S. 362 (1914); *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848).

In short, the judgment below is "final" within the meaning of 28 U.S.C. § 1257.

For the reasons stated, the judgment below also meets the specific requisite of 28 U.S.C. § 1257(2), conferring appellate jurisdiction. With respect to appellants' claim under the Equal Protection Clause, the decision of the New Jersey Supreme Court is, by its express terms, "in favor of [the] validity" of the New Jersey Commuter Income Tax. 28 U.S.C. § 1257(2). As to appellants' Privileges and Immunities Clause claim, the New Jersey court's decision is, in practical effect, a decision "in favor of its validity"; the tax is still being imposed.

(Should this Court not agree that the judgment appealed from meets the requirements of 28 U.S.C. § 1257 (2), we respectfully request that the Court treat this Jurisdictional Statement as a petition for certiorari under 28 U.S.C. § 1257(3)).

CONCLUSION

This case, we submit, presents a classic occasion for summary reversal: the plain disregard of a prior decision of this Court. The Court should summarily reverse the decision below, with instructions to declare the New Jersey Commuter Income Tax unconstitutional in light of *Austin v. New Hampshire*.

Respectfully submitted,

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